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Approved For Release 2003/12/02 : CIA-RDP67B00446R000300210002-4
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COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
(PURSUANT TO S. RES. 265, 88TH CONGRESS)

December 1, 1964

MONTHLY STAFF REPORT TO THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

RIGHTS OF FEDERAL EMPLOYEES

A. Right to Counsel

The Subcommittee is presently analyzing the results of a government-wide survey initiated in June to learn whether or not federal employees and applicants are permitted to have a counsel, friend, or relative present at interviews pertaining to suitability for government employment and for clearance for sensitive positions. The study was launched in response to complaints of improper questioning by security investigators, sometimes in violation of regulations, and of discouragement or denial of the presence of third parties at such sessions.

According to Subcommittee Chairman Ervin, although the survey is not complete, the thirty-eight replies received so far indicate a pattern of inconsistency in agency policies and variations even within the armed services.

Twenty-five agencies made a flat statement that they did not discourage or deny presence of counsel, family member or friend at the interviews. Three do not allow it, while several report that they neither encourage nor discourage it. A few will allow counsel, but deny or discourage the presence of a friend or relative.

The survey shows that agencies such as Atomic Energy Commission and Defense Department components, including the National Security Agency, allow counsel, friend or relative at the interview, while the Civil Service Commission, the U.S. Information Agency and the Navy Department either discourage or deny it.

In those instances where third parties are not permitted, two reasons are offered for the policy. One is protection of the employee, the second is protection of the national security. This practice, according to the Civil Service Commission, "limits the disclosure of alleged derogatory information to the employee and protects him from the disclosure to others of allegations that he may be able to refute successfully during the interview." The Navy, although it does not specifically deny presence of counsel, normally discourages it on the grounds that it would "hinder or defeat the very purpose of the interview by creating a formal, legalistic atmosphere that could prove restricting." The Department states "It is the employee's privilege in an interview to decline to answer any or all questions and the exercise of this privilege would be discounted in arriving at a determination on the merits of the case. Irrespective of the results of the interviews, an employee would not be issued security charges and suspended unless the proposed charges and the complete file, along with the results of the interview had been audited in the Department."

Where family members or friends are not involved in the investigation, the discussion is limited to the employee "to prevent dissemination of information which may unnecessarily embarrass or malign the employee."

In contrast to the Navy policy, the Department of Defense states that it neither discourages nor denies presence of counsel, family or friends in security interviews. This policy, the Subcommittee is told, applies to the Joint Chiefs of Staff, the Defense Atomic Support Agency, the Defense Communications Agency, the Defense Intelligence Agency, the Defense Supply Agency, and the National Security Agency. The Air Force, on the other hand, states that it does not discourage or deny an employee the opportunity to be represented by counsel or by a friend or a member of his family if he so desires. Army policy is to grant the individual's request to have counsel present during the interview "unless the purpose of the interview or the interests of national security would be compromised," and if either of these situations should prevail, the request is denied and the interviewee is given the opportunity to elect to proceed without counsel. If he does not wish to do so, the interview is terminated. Presence of family or friend not acting as counsel is "neither discouraged nor encouraged" by the Army.

The United States Information Agency applies to both applicants and employees its policy of not permitting presence of third parties, but they are advised that they may consult with counsel before answering any question or signing a statement.

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B. Psychiatric and Psychological Testing

In its investigation of the use of psychological and psychiatric testing of government employees, the Subcommittee found that in one example of such testing, the Department of State subjected a woman employee applying for Foreign Service to an extensive test on matters relating to her family, her sex life, her religion, her personal habits and other matters. One phase of the test involved 570 questions to which she was to respond rapidly "quickly and without any thinking or deliberation." Included were such true-false questions as:

"Christ performed miracles."
"I believe there is a devil and hell in after life."
"Once in a while I think of things too bad to talk about."
"I believe in a life hereafter."
"I feel sure there is only one true religion."
"Many of my dreams are about sex matters."
"I pray several times a week."

She had to indicate whether she was troubled, and to what extent, by matters including:

"Deciding whether I'm really in love."
"Being too inhibited in sex matters."
"Confused in my religious beliefs."
"Differing from my family in religious beliefs."

Other questions in these categories were even more shocking.

She was given 225 questions consisting of "pairs of statements about things that you may or may not like," and directed to "choose the one that is more applicable to you. If you like both, choose one you like best. If you like neither choose one you like least." Included were the following choices:

- A. I feel depressed by my own inability to handle various situations.
- B. I like to read books and plays in which sex plays a major part.

- A. I feel like blaming others when things go wrong for me.
- B. I feel I am inferior in most respects.

- A. I like to listen to or tell jokes in which sex plays a major part.
- B. I feel like getting revenge when someone has insulted me.

The Subcommittee Chairman asked the Department of State for a report on the type of information gained from these tests which would justify such an invasion of privacy, a description of the circumstances that would require such tests, and the individuals who make the determination of their need. In its reply, the Department states that "There are at least three types of situations, and possibly others, in which such testing is necessary in order to provide suitable help to the individual and to protect the interests of the U.S. Government." The three situations described involved:

1. Foreign Service employees who have been overseas and have begun to have an emotional breakdown due to the stresses of the post to which they have been assigned.
2. Security matters, where psychiatric consultation and psychological testing may be necessary to fulfill responsibilities under Executive Order 10450.
3. An employee or a dependent who has an emotional problem which requires treatment.

"Psychological tests are not resorted to by the State Department unless in the opinion of a psychiatrist they are needed to evaluate more objectively an employee or the dependents of an employee," according to the Department. Although it is recommended by the Medical Division, it is carried out by a private consulting psychologist, in his private office, using only "professionally recognized" tests. The detailed answers remain as part of his records, and the Medical Division receives only the conclusions of the testing.

In another instance, the Labor Department asked applicants for the Department's Youth Opportunity Program questions concerning such widely divergent subjects as whether they believed there was only one true religion, liked poetry, or "hardly ever" became "excited or thrilled."

CONSTITUTIONAL RIGHTS OF INDIGENT DEFENDANTS

The Subcommittee Survey of "Methods for Providing Counsel for Indigent Defendants in State Criminal Proceedings," has been completed as part of the continuing study of constitutional rights and the administration of criminal justice. It will be submitted to the Subcommittee members shortly. This document includes a summary of State practice concerning indigent defendants, texts of the pertinent laws and court procedures, and answers by State Governors and other officials to an inquiry by Chairman Ervin regarding the impact on State practices of Gideon v. Wainwright, the Supreme Court decision requiring that States provide counsel to indigent defendants in criminal proceedings.

ANNUAL REPORT

The Subcommittee's Annual Report on its activities during 1964 is near completion and will be submitted for approval of the members in early January.

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